provide "a telecommunications service," and imposes a duty upon ILECs to provide "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[135] That provision further requires that the cost-based rate established for UNEs pursuant to Section 252(d)(1) apply where UNEs are used to provide telecommunications services.[136] Resold services, on the other hand, are to be priced at the retail rate less a discount.[137]

Nothing in the statute indicates that the resale discount would apply where the requesting carrier recombines UNEs to provide services already provided by the incumbent. Such a restriction would permit CLECs without their own independent facilities to use recombined UNEs to provide only the narrow set of services not provided by the incumbent. Stated another way, such a restriction would in most cases require a requesting carrier to combine UNEs with its own independent facilities in order to qualify for the UNE cost-based rate.

In Iowa Utils. Bd. v. FCC, the Eighth Circuit confirmed that requesting carriers may combine UNEs to provide finished services.[138] The Court also emphasized that Section 251(c)(3) "imposes a duty on incumbent LECs to provide unbundled access 'to any requesting telecommunications carrier for the provision of a telecommunications service.'"[139] The Court concluded that "any requesting telecommunications carrier" includes carriers that rely exclusively

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135 47 U.S.C. § 251(c)(3).

136 Id. at § 252(d)(1).

137 Id. at § 252(d)(3).

138 See Iowa Utils. Bd. v. FCC, 120 F.3d 753, at 814-815 (8th Cir. 1997).

139 Id. at 814 (emphasis in original) (citation omitted).

on UNEs to provide finished services.[140] As the Court found, this logic mandates that such finished services include those already provided by the incumbent.

This is not a pricing issue subject to the exclusive jurisdiction of the states. In finding that the FCC has jurisdiction to define UNEs and in upholding the FCC's rules permitting requesting carriers to rebundle UNEs to provide finished services, the Eighth Circuit confirmed that such considerations fall squarely within the FCC's jurisdiction. Thus, under Iowa Utils. Bd. v. FCC, the FCC has the jurisdiction to determine when the UNE and resale rates apply while the states have the jurisdiction to determine what the UNE and resale rates will be.[141] Any attempt to squeeze the definitional issues within the states' jurisdiction over pricing would eviscerate the FCC's authority to define UNEs under Section 251(d)(2).

E. BellSouth Does Not Provide Interconnection In Compliance With Section 251(c)(2) Or The Commission's Rules.

Section 271(c)(2)(B)(i) establishes the checklist requirement that BOCs interconnect with CLECs for the transmission and routing of local exchange and exchange access traffic at any technically feasible point.[142] BellSouth is violating this requirement in Louisiana by refusing to

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140 See id.

141 Of course, under BellSouth's interpretation, the incumbent would have the ability to force a competitive LEC to accept the wholesale discount for resold services simply by offering a service that is provided by the competitive LEC over UNEs. This would place the definitional issue within the jurisdiction of the incumbent LEC.

142 See id. at § 271(c)(2)(B)(i) (requiring interconnection in compliance with Section 251(c)(2) which in turn requires incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access").

exchange different kinds of traffic, except local and intraLATA toll, over the same interconnection trunks.[143]

First, despite BellSouth's assertions,[144] there can be no question that the exchange of different kinds of traffic over the same interconnection trunks is technically feasible. In fact, BellSouth admitted as much in the Sprint arbitration proceeding in Florida.[145] The Florida PSC agreed and ordered BellSouth to provide mixed (local, toll and CMRS) traffic trunks for interconnection with Sprint.[146] As the Florida PSC found, there is simply no reason why the "Percent Interstate Usage" ("PIU") factors currently used by carriers to identify interstate and intrastate access minutes cannot be used identify local and wireless traffic as well. Indeed, as it

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143 See SGAT at I.D ("BellSouth and a CLEC shall establish trunk groups between interconnecting facilities. . . . Local and interLATA traffic only may be routed over the same one-way trunk group. Requests for alternative trunking arrangements may be made through the bona fide request process set out in Attachment B"); Milner Aff. at ¶ 15 ("BellSouth offers routing of local and intraLATA toll traffic over a single trunk group"). The LPSC refused Sprint's request that it be permitted to exchange different traffic types over the same interconnection trunks. See Sprint Arbitration Order at App. D to Original Louisiana App. Tab 4 at 8-9 (concluding that such arrangements are technically infeasible).

144 See Varner Aff. at ¶ 48 ("BellSouth offers routing of local and intraLATA traffic over a single trunk group. Access traffic, as well as all other traffic utilizing BellSouth's intermediary tandem switching function, is routed via a separate trunk group. The CLEC may choose to order two-way trunks for exchange of combined local and intraLATA toll traffic at BellSouth end offices or access tandems. Because of the complexities of traffic separation, combining several types of traffic on the same trunk group is not practical and creates allocation factors that cannot be verified.")

145 See Petition by Sprint Communications Company L.P. for Arbitration, *Final Order On Arbitration*, Florida PSC Docket No. 961150-TP, 97 FPSC 9 at § VI ("Although BellSouth admits that Sprint's proposal [for exchanging different traffic types over the same trunk] is technically feasible, it opposes Sprint's offer for billing purposes").

146 See id.

has stated in the past, Sprint is willing to share any reasonably necessary billing records to ensure accuracy of traffic measures.

Thus, BellSouth appears to be preventing CLECs from interconnecting in the most efficient manner possible, not because of any technical limitation, but because it is trying to raise its rivals' costs. The Commission should therefore make it clear in this proceeding that the checklist requires that a BOC provide all forms of technically feasible interconnection to CLECs, including arrangements for the exchange of local, CMRS, intraLATA and interLATA traffic over the same interconnection trunks.

F. BellSouth Has Refused To Provide Numerous Checklist Items Based On Unfounded Claims Of Technical Infeasibility.

As the example of mixed traffic interconnection trunks demonstrates, one of the BOCs' most potent weapons in avoiding full compliance with the competitive checklist is the claim that a particular interconnection or unbundling arrangement is technically infeasible. Such claims are difficult for competitors to contest and regulators to evaluate since the incumbent possesses superior information about its own network. The Commission should therefore establish a rebuttable presumption that any interconnection or unbundling arrangement found by one state to be technically feasible is technically feasible in any other state. The BOC may only rebut this presumption with specific facts demonstrating a material difference from the arrangement found to be feasible. Absent such a showing, failure to provide an arrangement based on a claim that it is infeasible should be deemed a violation of the relevant competitive checklist provision.

This approach to technical feasibility issues is consistent with the Commission's treatment of the issue in the Local Competition Order. There, the FCC determined that the phrase

"technically feasible" in Section 251(c)(2) and (3) should be given the same meaning.[147] The Commission further held that successful implementation of an interconnection or access arrangement in one network was "substantial evidence" that the same arrangement would be technically feasible in another network.[148] Sprint's proposed feasibility presumption is simply an extension of that logic.

The state-by-state review of Section 271 checklist compliance offers a helpful check against the BOCs' endless claims of technical infeasibility. There are many instances beyond the mixed traffic interconnection context in which the presumption would prove useful. For example, in the First AT&T Arbitration Order, the LPSC rejected, apparently on technical infeasibility grounds, AT&T's request for unmediated access to BellSouth's advanced intelligent network ("AIN").[149] The South Carolina PSC, however, has specifically found that there is "no need for a mediation device," and ordered BellSouth to provide unmediated access to AIN triggers.[150] Similarly, BellSouth persuaded the LPSC that it was technically dangerous to permit AT&T to disconnect and ground the BellSouth wire when attaching its facilities to network interface devices ("NIDs") where there are no spare lines at the NID.[151] The SCPSC, however, saw

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147 See Local Competition Order at ¶ 192.

148 See id. at ¶ 204.

149 See LPSC First AT&T Arbitration Order App. C-2 Tab 188 at 33-34. BellSouth continues to adhere to this position. See Milner Aff. at ¶ 147 ("Appropriate mediation devices will be used as required and as ordered by state commissions to safeguard network security.")

150 See SCPSC AT&T Arbitration Order App. B Tab 69 at 9.

151 See LPSC Final AT&T Arbitration Order App. C-2 Tab 205 at 29. BellSouth apparently continues to maintain this position in the current iteration of its Louisiana application. See Milner Aff. at ¶ 34 (". . . BellSouth has agreed to allow a CLEC to connect its loop

through BellSouth's tactics and found this arrangement to be technically feasible.[152] Not surprisingly, BellSouth refuses to provide arrangements in Louisiana that it has convinced the LPSC are technically infeasible, notwithstanding another state commission's conclusion that these same arrangements are feasible. This kind of gamesmanship should not be tolerated. BellSouth should not be deemed to be providing interconnection in compliance with the checklist unless it provides specific evidence that the circumstances in Louisiana are sufficiently different to warrant a finding of technical infeasibility.[153]

G. BellSouth Cannot Demonstrate That It Provides Local Loops Consistent With The Requirements Of Section 271(c)(2)(B)(iv).

BellSouth has also failed to provide evidence that it provides local loop transmission facilities consistent with its obligation under Section 271(c)(2)(B)(iv). Since the burden is on BellSouth to demonstrate compliance with this checklist item, the application is deficient in this regard.

Based upon Sprint's best interpretation of the conflicting evidence presented by BellSouth, it appears that no local loops have been provisioned as of June 1, 1998, while 107 remain on

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directly to any spare terminals in the BellSouth NID and thereby gain access to the customer's inside wire") (emphasis added)(citation omitted).

152 See SCPSC AT&T Arbitration Order App. B Tab 69 at 10.

153 Nor can it be argued that the FCC lacks the authority to establish feasibility presumptions. Given the FCC's exclusive jurisdiction under Section 251(d)(2) to "determine what network elements should be made available" by the incumbents, the only possible jurisdictional issue would concern the application of the presumption to particular local interconnection arrangements. As discussed above, however, the FCC has independent jurisdiction under Section 271 to evaluate the extent to which a BOC is providing interconnection in compliance with the requirements of the Act.

order.[154] This conclusion is based upon BellSouth's representations to that effect in its brief -- "As of June 1, approximately 107 loops had been promised in Louisiana."[155] In making this representation, BellSouth cites to the Wright affidavit at ¶ 41, which does not stand for this proposition at all.[156] Rather, the Milner affidavit supports BellSouth's proposition with respect to both the number of loops ordered as well as their unprovisioned status.[157] Furthermore, it should be noted that BellSouth filed its brief on July 9. At a minimum, this fact suggests that BellSouth is unable to provision loops in 6 weeks time (June 1 - July 9), an unacceptable time period for any new entrant to commence service to customers and effectively compete. Based upon this internally conflicting evidence between BellSouth's brief and its own experts, and the staleness of BellSouth's data, BellSouth has not demonstrated that it can satisfy orders for loops at all, let alone in a timely and non-discriminatory fashion.

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154 See BellSouth Br. at 43. While the Milner Aff. says that 107 loops had been ordered by CLECs as of June 1, the Wright public affidavit contradicts this by stating that as of June 1 "approximately 100" loops had been provisioned and placed in service by two CLECs. See Wright Aff. at ¶ 41.

In its brief, BellSouth mistakenly cites to the Wright affidavit for a proposition instead contained in the Milner affidavit. "As of June 1, approximately 107 loops had been promised in Louisiana." BellSouth Br. at 43 (citing Wright ¶ 41) (emphasis added).

155 BellSouth Br. at 43 (emphasis added) (citing Wright ¶ 41) (emphasis added).

156 Paragraph 41 of the Wright affidavit, rather, stands for the proposition not advanced by BellSouth that as of June 1 "approximately 100" loops had been provisioned and placed in service by two CLECs in Louisiana. See Wright Aff. at ¶ 41.

157 See Milner Aff. at ¶ 52 ("While as of June 1, 1998, CLECs in Louisiana had requested 107 unbundled loops from BellSouth . . . .").

H. BellSouth Has Failed To Provide Interim Number Portability in Accordance with Section 251(e)(2) and Section 271(c)(2)(B)(xi).

BellSouth has failed to provide available interim number portability ("INP") consistent with its Section 251 and 271 obligations because its rates for INP shift all incremental costs to competitive carriers -- BellSouth pays nothing. In addition, BellSouth has not demonstrated that it divides access revenues consistent with the Number Portability First Report and Order.[158]

Section 271(c)(2)(B)(xi) obligates BellSouth to provide interim number portability in order for the Commission to authorize interLATA authority.[159] Section 251(e)(2) states that the costs of number portability are to be "borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[160] In its First Report and Order implementing number portability, the Commission noted that the competitive neutrality requirement, in certain instances, may "constitute[] a rare exception to the general principle . . . that the cost-causer should pay for the costs that he or she incurs."[161] Consistent with the statute, the Commission set forth a standard whereby "all telecommunications carriers" -- including both ILECs and CLECs -- pay the incremental costs of INP.[162] Furthermore, the Commission specified that a competitively

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158 Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996) ("First Number Portability Order").

159 See 47 U.S.C. § 271(c)(2)(B)(xi).

160 See 47 U.S.C. § 251(e)(2).

161 First Number Portability Order at ¶ 131.

162 See id. at ¶¶ 121-140.

neutral cost recovery mechanism should not "give one service provider an appreciable, incremental cost advantage over another service provider . . . ."[163]

As with other Section 271 requirements, BellSouth apparently disagrees with the Commission on these points and would prefer instead to unilaterally impose the incremental costs of INP on new entrants alone, rather than share in the costs.[164] This is precisely the situation the Commission's First Report and Order contemplated and prohibited. Until BellSouth agrees to contribute to the incremental cost of INP, the Commission must reject this application.

In addition, BellSouth has not demonstrated compliance with the First Report and Order with respect to division of access revenues from IXCs. The First Report and Order requires that long distance access revenues received from IXCs be divided among competing local service providers according to a system of meet-point billing:

> [I]n response to questions concerning the appropriate treatment of terminating access charges in the interim number portability context, we conclude that the meet-point billing arrangements between neighboring incumbent LECs provide the appropriate model for the proper access billing arrangement for interim number portability. . . . We believe that to permit incumbent LECs to retain all terminating access charges would be . . . inappropriate. . . . Therefore, we direct forwarding carriers and terminating carriers to assess on [long distance carriers] charges for terminating access through meet-point billing.[165]

This sharing of revenues is appropriate for long distance calls. Though BellSouth's affidavits do not discuss the process involved with INP in much detail, typically both BellSouth and the CLEC

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163 Id. at ¶ 132.

164 See Comments of AT&T Communications of the South Central States, Inc., filed in LPSC Dkt. No. U-22252 (May 26, 1998).

165 First Number Portability Order at ¶ 140 (emphasis added).

perform the functions necessary to handle a long distance call. In the remote call forwarding environment, for example, a call will first be directed to BellSouth's network and then forwarded to the CLEC's facilities for switching and termination. BellSouth is not in compliance on this issue. Given these problems, the FCC must find that BellSouth is failing to provide interim number portability on terms and conditions that satisfy the statute.

I. BellSouth Continues to Resist Its Unambiguous Obligation to Pay Reciprocal Compensation for Calls to ISPs.

BellSouth adamantly refuses to pay termination charges to CLECs that terminate calls to information service providers, notwithstanding regulatory rulings, interconnection agreements, and Section 251(d) and 271(c)(2)(B)(xiv) -- all of which obligate BellSouth to do so. BellSouth states it simply disagrees that such calls are local in nature.[166] Sprint believes that it is precisely this sort of "self-help" in the face of repeated and unambiguous legal directives that the FCC must not tolerate.

No fewer than nineteen public utility commissions as well as federal and state courts have rejected the BellSouth position.[167] Two of these are BellSouth regulatory authorities that have directly advised BellSouth that its position is wrong.[168] BellSouth has currently revived its faith in the supremacy clause and sought federal preemption of these state decisions.[169]

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166 BellSouth Brief at 59-60.

167 Brief Amicus Curiae of MCI Telecommunications Corp., U S West Comm'ns, Inc. v. MFS Intelenet, Inc. et al., at 46-49 and cases cited therein, (9th Cir. No. 98-35146) (filed June 23, 1998). See Ill. Bell Telephone Co. v. WorldCom Technologies, Inc., No. 98 C 1925, 1998 U.S. Dist. LEXIS 11344 (N.D. Ill. July 23, 1998).

168 Interconnection Agreement Between BellSouth Telecommunications Inc. and US LEC of North Carolina, LLC, Docket No. P-55, SUB 1027, Order Concerning Reciprocal Compensation for ISP Traffic, (NCUC Feb. 28, 1998); Petition of Brooks Fiber to

But in the interim, BellSouth has steadfastly withheld payment owed to these CLECs. Most curiously, BellSouth has insisted that "[t]his contractual dispute over ESP traffic has no bearing on whether BellSouth has met the reciprocal compensation requirements of the 1996 Act...."[170]

As made clear by the legal rulings cited above, the issue goes far beyond a mere "contractual dispute." It is an established legal requirement. BellSouth is of course free to petition the government to revise the law, as it is doing in the FCC's proceeding on the ISP issue. What it cannot do is to unilaterally act as if the law had already been changed in its favor. BellSouth's "state of denial" with respect to its extant legal obligations disqualifies its 271 application.

J. BellSouth Fails To Offer Nondiscriminatory Access To Poles, Ducts, Conduits, And Rights-Of-Way.

The BellSouth documents do not demonstrate whether access to poles, ducts, conduits, and rights-of-way is functionally available, as required by Section 271(c)(2)(B)(iii). The supporting affidavits are vague about whether any carriers actually and currently occupy BellSouth structures in Louisiana. BellSouth claims that 14 CLECs operating in Louisiana have entered into license agreements with it for access to poles, ducts, and conduits.[171] Executed license agreements, by themselves, do not permit carriers to attach to BellSouth structures;

Enforce Agreement and for Emergency Relief, Dkt. No. 98-00118, Initial Order of Hearing Officer(Tenn. Reg. Auth. Apr. 21, 1998).

169 See BellSouth Ex Parte, CCB/CPD 97-30 (dated July 17, 1998).

170 BellSouth Br. at 60.

171 Milner Aff. at ¶ 50.

separate license applications must be submitted and approved for each set of poles, ducts, conduits, or rights-of-way to which access is desired.[172] The existence of executed license agreements alone cannot demonstrate that BellSouth has permitted carriers to actually occupy its structures.

Only nine applications have been submitted to BellSouth and these applications were submitted by only four carriers.[173] But applications mean little if access is not granted. BellSouth's submission offers no quantitative measure of those applications that have been granted nor does it indicate how many carriers currently occupy BellSouth structures in Louisiana.

In fact, it remains unclear that these applications are for access to BellSouth structures in Louisiana. BellSouth permits carriers to secure region-wide licenses.[174] Nothing in the affidavits indicates whether the carriers with licenses covering Louisiana submitted applications for and have obtained access in that state. The approval sought by this application is limited to the State of Louisiana. If the desired approval is to be granted, BST must provide information relevant to that State. This application fails in that regard.

Moreover, there are significant barriers to actually occupying BellSouth structures. As noted above, a competitive carrier must submit separate license applications for each set of poles,

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172 Kinsey Aff. at ¶ 7.

173 See id. at ¶ 21.

174 See id. at ¶ 5.

ducts, conduits, or rights-of-way that it wishes to occupy.[175] This process may be excessively lengthy, particularly because of the records analysis that must first be performed.

Indeed, the process of obtaining the necessary records is lengthier for CLECs than it is for BellSouth -- a delay ultimately increasing the time by which a competitor can expect to occupy BOC facilities. BellSouth admits that it receives "more immediate and direct access to these records than CLECs. . . ."[176] The length of time in CLEC preparation of access requests is increased due, in part, to discrimination by BellSouth in the time it takes to provide the necessary access to records.

The delay is not harmless discrimination; the difference in record access times may affect whether a competitive carrier receives access to ILEC structures that Congress deemed essential to local exchange competition. BellSouth claims that its own access requirements are "handled internally in a manner equivalent to its response to a CLEC request," and that it "does not reserve space for its own future business needs or give itself a preference when assigning space."[177] Yet, BellSouth processes applications on a first-come, first-served basis.[178] The discrepancy in record access times will affect the relative time it takes a CLEC and BellSouth to obtain and analyze records and submit an application for access. BellSouth gives itself a head start that increases the likelihood that it will be "first in line" for access to poles, ducts, conduits, and rights-of-way.[179]

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175 See id. at ¶ 7.

176 See id. at ¶ 9.

177 Id. at ¶ 13.

178 See id. at ¶ 7.

179 BST -- the sole possessor of the relevant information -- fails to present the time frames within which it processes CLEC access requests and its own access requests, rendering

Moreover, a CLEC's request for records will disclose to BellSouth the CLEC's approximate network construction plans. BellSouth could use its competitors' sensitive construction information to accelerate its own construction plans. By virtue of its preferred access to records -- and the resultant speedy application submission that it is able to achieve -- BellSouth becomes able to preempt a CLEC's request for use of limited pole and conduit facilities.

In some instances, this timing advantage could mean that space once available for the CLEC becomes unavailable due to BellSouth's interest in it. Section 271(c)(2)(B)(iii) requires "nondiscriminatory access" to the applicant's poles, ducts, conduits, and rights-of-way. By its own terms, BellSouth's application fails in its burden to show compliance with this precondition of providing in-region interLATA service.

III. BST AND BSLD FAIL TO COMPLY WITH SECTION 272 NON-ACCOUNTING SAFEGUARDS.

The structural separation of BellSouth's long distance business ("BSLD") from BellSouth's telephone operating companies ("BST") operates as one of the principal protections of the public interest and local exchange competition. This separation is achieved in large part by the requirement that the separate affiliate "have separate officers, directors, and employees from the BOC of which it is an affiliate."[180] Responsibility for enforcement of compliance with the Section 272 requirements lies not only with the Commission and competitors, but in the first instance with the 272 affiliate's Board of Directors.

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infeasible a quantitative discrimination analysis as regards poles, ducts, conduits, and rights-of-way.

180 47 U.S.C. § 272(b)(3).

Directors serve an important role in managing the corporation on behalf of the shareholders.

> Shareholders have a right to expect that directors will exercise reasonable supervision and control over the policies and practices of a corporation. The institutional integrity of a corporation depends upon the proper discharge by directors of those duties.[181]

Directors owe an "unyielding fiduciary duty to the corporation"[182] and as well as a duty of care, "the wellspring from which . . . more specific duties flow."[183] As a function of their duty of care, directors must vigilantly monitor the corporation in order to ensure that it is run according to the law.[184] As the Corporate Director's Guidebook advises, "[t]he corporate director should be concerned that the corporation has programs looking toward compliance with applicable laws and regulations."[185] The complex legal environment surrounding BSLD's activities heightens the need for effective operation of the directors' traditional oversight function. "A director is not an ornament, but an essential component of corporate governance."[186]

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181 Francis v. United Jersey Bank, 432 A.2d 814, 824 (N.J. 1981) (emphasis added).

182 See Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

183 Francis, 432 A.2d at 821.

184 See generally id.; see also United States v. Park, 421 U.S. 658 (1975)(noting the "requirements of foresight and vigilance" imposed on responsible corporate agents in seeking out and remedying violations of law and to implement measures to ensure such violations do not occur).

185 Corporate Director's Guidebook at p. 1610, (as quoted by the American Law Institute's Principles of Corporate Governance, Tent. Draft No. 4 (1985) Comment c. to § 4:01(a)(1)-(a)(2) in Lewis D. Solomon, et al., Corporations Law and Policy, Ch. 14, § 2A (2nd ed. 1988); see also, Business Roundtable Statement at 101, as cited in Lewis D. Solomon, et al., Corporations Law and Policy, Ch. 14, § 2A (2nd ed. 1988)("identifying law compliance as a 'core function' of the board").

186 Francis at 823.

Notwithstanding the substantial responsibilities of a Board of Directors -- and BSLD's heightened need for regulatory compliance monitoring -- the wall of compliance protection that BSLD has constructed consists of only one person: David W. Scobey.[187] David Scobey's expertise, alone, is intended to guide the company through the maze of legal and business challenges certain to confront BSLD. David Scobey, alone, must ensure that BSLD complies strictly with the regulatory obligations arising out of its position as a BOC affiliate. Simply put, the most valuable monitoring role that the Board of Directors assumes involves collective oversight. BSLD is bereft of those valuable assets and protections.

BSLD is a corporation organized under the laws of Delaware,[188] which permits corporations to be operated by one or more directors.[189] Yet, minimal compliance with state corporate law is not sufficient to meet the standards of Section 272. As the Ameritech Order demonstrates, the unconventional corporate structure chosen by Ameritech's long distance affiliate, ACI, was permitted under Delaware law.[190] Moreover, the Commission noted that "section 272 and [the Commission's] rules do not require that [the 272 affiliate] maintain any particular form of corporate organization."[191] Nevertheless, the Commission was obliged to look behind the structure to its operative implications and, upon doing so, recognized that,

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187 See Wentworth Aff. at ¶ 12.

188 See Wentworth Aff. at ¶ 7.

189 See DE ST TI 8, § 141(b)("The board of directors of a corporation shall consist of 1 or more members.").

190 See Michigan Order at ¶ 357.

191 Id. at ¶ 355.

notwithstanding compliance with state corporate law, the structure of ACI violated Section 272(b)(3).[192]

The same is true in the instant Petition. To be sure, BSLD's corporate structure complies with Delaware state law. However, if Section 272's separate director requirement is to mean anything, it is to ensure that the long distance affiliate is independent of the BOC -- to ensure that it has a source of independently informed guidance and that its compliance with legal requirements is monitored sufficiently. The single directorship of BSLD represents the lightest capitulation to the regulatory requirement without due consideration for the effective realization of the Board's fiduciary and legal duties. As the Commission noted, "Congress intended its separate director requirement not be easily nullified merely through a legal fiction."[193] Moreover, Congress must have intended its separate director requirement to have some meaningful effect. BSLD's one director structure reveals inappropriate laxity with regard to regulatory compliance.

The joint marketing activities of BST and BSLD offer another example of perhaps superficial regulatory compliance coupled with a demonstrable disregard for the underlying purpose of the regulations. In the South Carolina Order, the Commission concluded that a BOC could mention its long distance affiliate to inbound callers or calls from new customers so long as the BOC also offered to read, in random order, the names and, if requested, the telephone numbers of all available interexchange carriers.[194] The Commission determined that its Non-

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192 See id. at ¶ 361.

193 Id.

194 South Carolina Order at ¶ 237.

Accounting Safeguards Order had balanced a BOC's equal access obligations under Section 251(g) and its right to market services jointly with its affiliate under Section 272(g).[195]

However, BellSouth's application seeks to go further than simply recommending its affiliate's long distance services to inbound callers: it states that BSLD will provide sales tools to assist BST sales personnel to answer customer questions that seek comparison of BSLD services with those of other providers.[196] Allowing BST to provide a comparison of the services of BSLD and those offered by other IXCs for end users places BST in a position of undue point-of-sale influence derived simply from its status as the incumbent local exchange carrier. Indeed, the strategy advances BST's ability to leverage its local monopoly position into the long distance market. Moreover, the failure to allow for other IXCs to verify the accuracy of the comparisons made raises both competitive and consumer protection concerns. The Commission should prohibit the proposed arrangement as exceeding the bounds of acceptable joint marketing.

Finally, the carelessness with which BST approaches its regulatory obligations is manifest in its recitation of "compliance" with those requirements. For example, the application's supporting documents state that BST and BSLD do not perform operating, installation, and maintenance functions associated with the other's switching and transmission facilities.[197] The Commission's rule is broader, though, and includes all facilities, not merely switching and transmission.[198] Another supporting document claims that the testing and services that BST will

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195 See id.

196 See Wentworth Aff. at Attachment (BSLD/BST Trial Marketing and Sales Agreement, Schedule A).

197 See Wentworth Aff. at ¶ 10.

198 See 47 C.F.R. § 53.203(a)(2) and (3).

provide to BSLD under the Facility Use Agreement are listed in Appendix A to the Agreement.[199] The agreement does not contain an Appendix listing such information. Access to the missing information is important for ensuring compliance with Section 272's prohibition on the BOC's performance of operation, maintenance, or installation functions on its Section 272 affiliate's facilities (or vice versa).[200] BellSouth's general disregard for compliance with the Section 272 requirements, coupled with BSLD's lack of sufficient corporate oversight, strongly suggests that, until BellSouth demonstrates a greater commitment to its regulatory obligations, denial of the application is the most appropriate result.

IV. BELLSOUTH'S APPLICATION IS INCONSISTENT WITH THE PUBLIC INTEREST.

Congress determined that no BOC should be allowed entry into the interLATA market within its region until it has relinquished its monopoly stranglehold over the local exchange markets on a state-by-state basis. Since this has not been done in Louisiana, it would violate the public interest to permit BellSouth in-region, interLATA relief in that State. To allow BOC entry prematurely would forego the anticipated benefits that flow from local telephone competition, and would substantially diminish if not eradicate the consumer benefits of today's competitive long distance markets.

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199 See Wentworth Aff. at Attachment (Facility Use Agreement, p. 1).

200 See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 as amended, 11 FCC Rcd 21905, at ¶ 158 (1996) ("Non-Accounting Safeguards Order"); see also 47 C.F.R. § 53.203(a)(2) and (3).

A. The Effects On the Local Market Alone Dictate the Conclusion that Relief Would Be Contrary to the Public Interest.

As the Commission has recognized, the prospect of interLATA entry is the incentive given by Congress to a BOC to induce its cooperation in opening its local monopoly.[201] Absent this inducement, no BOC would rationally relinquish its bottleneck and voluntarily aid in bringing about competition.[202] BellSouth can do much more to lower entry barriers to its local markets; the public interest requires denial of the application until BellSouth fulfills its obligations.

Congress determined that no BOC should be allowed entry into the interLATA market within its region until it has relinquished its monopoly stranglehold over the local exchange markets on a state-by-state basis. This has not occurred in Louisiana, and consistent with the public interest BellSouth should not be permitted to provide interLATA services originating in Louisiana.

1. BellSouth Has Not Shown That Competition Is Enabled In Louisiana.

The Department of Justice has indicated that local markets must be "irreversibly open" to competition in order to ensure that BOC entry will serve the public interest.[203] As the Commission has explained,

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201 See Michigan Order at ¶ 23.

202 See Shapiro and Hayes Dec. (App. B) at App. A, at 2. As the FCC has found:

> incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services.

Local Competition Order ¶ 55.

203 See DOJ Oklahoma Evaluation at 44 (citing Schwartz Aff. at ¶¶ 19, 149-169).

> it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available. The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).[204]

BellSouth has failed to demonstrate that the local markets have been irreversibly opened to competition. BellSouth's brief instead demonstrates that an insignificant amount of CLEC service is being offered primarily to business, via resale, dispersed among several localities in Louisiana. The competitive numbers are small when viewed in the aggregate, including both facilities-based and resale, and business and residential. Once disaggregated, the numbers are virtually non-existent for facilities-based residential. Only one service provider offers *any* residential service on a facilities-basis -- less than 10 lines. This represents less than .0007% of all facilities-based lines to residences in Louisiana. Moreover, these lines are being provided at business rates which likely renders them virtually meaningless for purposes of counting residential facilities-based competition.

The tiny number of total lines served by CLECs is consistent with, *inter alia*, the small number of collocation arrangements established and local loops provisioned to date. A number of other factors confirm the dearth of competition, including the small number of ported residential (1) and business numbers (1,537).[205] The Wright affidavit indicates there are only eight operational collocation arrangements in Louisiana as of June 1, 1998.[206] Even when added to the

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204 Michigan Order at ¶ 391.

205 See BellSouth Br. at 57.

206 See Wright Aff. at ¶ 38.

number of collocation arrangements agreed upon and in the process of being established (13) the numbers remain truly minute. This represents activity in only 12 of the 228 Louisiana BellSouth central offices.[207] With respect to local loops, it appears that none have been provisioned as of June 1, 1998, while 107 remain on order.[208] The lack of competitive entry by way of lease of unbundled local loops or independent facilities is underscored by the fact that only one residential number has been ported throughout the state of Louisiana.

As explained by Shapiro and Hayes, significantly more commitment must be observable to ensure that entry barriers have in fact been lowered and competition has been enabled. The best test would of course be vigorous competition on a facilities-basis. Absent this, BellSouth must show diverse investment by CLECs to reflect their confidence in the openness of the market and a commitment to market entry and expansion (*i.e.*, investment in independent facilities and the availability of UNEs and resale).[209] BellSouth cannot show this either. And it can not show that entry barriers have been removed; the multi-fold interconnection disputes and uncertainties in fact demonstrate the markets have not been opened.

As Shapiro and Hayes explain:

> If CLECs were providing services on a commercial scale in a variety of settings in Louisiana, we could be confident that interconnection was working (although the need for ongoing regulation would not soon end). In fact, however, CLECs collectively provide facilities-based service to only a minute fraction of Louisiana's business customers and to almost no residential customers. The limited presence of PCS providers does little to demonstrate the extent to which BellSouth's local interconnection processes and

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207 Id. at ¶ 39.

208 See supra discussion at 52-53 citing, inter alia, BellSouth brief which states that as of June 1, 1998 107 loops had been "promised."

209 See Shapiro and Hayes Dec. at 25-26. The DOJ has reached a similar conclusion. See Schwartz Aff. at ¶ 20, attached to DOJ Evaluation for South Carolina.

> operational support systems are working, because PCS providers are not reliant upon the vast majority of these processes or facilities. PCS providers do not purchase unbundled network elements from the BOC, and consequently do not use the retail ordering and billing systems; instead, PCS carriers use the wholesale systems for ordering trunks which have been in existence for years and are, as opposed to newly-created interconnection processes and OSS, well-tested. Moreover, numerous problems have been reported with BellSouth's interconnection terms and conditions across its region and, short of evidence of interconnection working in a variety of circumstances, there is no assurance that these problems have been worked out in Louisiana.[210]

Significantly, not one of BellSouth's expert consultants have concurred in BellSouth's remarkably contrived portrayal of competition in the Louisiana local markets. They variously offer their views on how likely monopolists are to engage in predation,[211] whether consumers appreciate one-stop shopping,[212] whether additional entry into long distance might be beneficial,[213] etc., but not one of them apparently could be convinced to sign an affidavit confirming the implausible competition conclusions of BellSouth's "fact witnesses." Indeed, to his credit, Professor Woroch directly acknowledges the scarcity of competitive entry:

> [T]he absence of competitive wireline local exchange service for residential customers in Louisiana should come as no surprise. Construction of wireline networks complete with local loops is an expensive and time consuming undertaking. Installing facilities such as local switching for combination with unbundled elements obtained from the incumbent also requires substantial planning and investment.[214]

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210 Shapiro and Hayes Dec. at 27.

211 See Roberts Aff. (passim).

212 See Gilbert Aff. (passim).

213 See Hausman Aff. (passim).

214 Woroch Aff. at ¶ 25.

Professor Woroch in fact goes on to draw a conclusion directly opposite to BellSouth's lawyers and employees; he opines that

> Louisiana lacks telecommunications demand characteristics that would make such facilities-based network investment attractive. Furthermore, the situation is not improving given the steady deterioration in the Louisiana economy in recent years . . .[215]

Fortunately, Sprint and the numerous other companies interested in entering the Louisiana local markets do not share the professor's pessimism for competitive prospects there.

2. The Commission has Expansive Powers Under the "Public Interest" Section of 271.

BellSouth reiterates the arguments it pressed in its prior 271 applications in its effort to narrow the reach of the Commission's public interest evaluation under Section 271.[216] BellSouth states that "the Commission may not use the public interest inquiry to add local competition criteria beyond those that Congress included in the checklist." [217] While BellSouth appears to argue that the Commission lacks the authority to evaluate the level of entry barriers in the local telephone markets in Louisiana, it nevertheless concedes that the FCC may "evaluate such matters as . . . the degree to which the checklist, Section 272, and other regulatory safeguards constrain anticompetitive conduct in the interLATA market."[218] The presence of anticompetitive conduct as it effects local markets is apparently off limits under this awkward interpretation.

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215 Id.

216 See Petition of BellSouth Corporation for Reconsideration and Clarification, filed in Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan, CC Dkt. No. 97-137 (filed) ("BellSouth Petition for Reconsideration of Michigan Order").

217 BellSouth Br. at 74.

218 Id. at 75.

The Commission must reject this caricature as it sacrifices the entire wisdom and value of administrative agency delegations by Congress. The "public interest" standard is used by Congress to provide an agency with the flexibility necessary to implement major goals and policy objectives within the agency's domain; it should be exercised accordingly.[219]

Of course, the scope of the Commission's public interest jurisdiction under Section 271 is of academic value only here, where BellSouth has not complied with the checklist. Sprint therefore confines this discussion to a summary rebuttal of BellSouth's unduly narrow views of the public interest.

BellSouth's mischaracterization notwithstanding, the Supreme Court has described the term "public interest, convenience, and necessity" as a "supple instrument" granting broad powers to the FCC.[220] Those powers call for "imaginative interpretation"[221] and dispense "broad"

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219 The "public interest" is a hallmark of many regulatory statutes. See, e.g., Federal Power Act, 16 U.S.C. Section 824c (Federal Power Commission may authorize the issuance of a security by a public utility only "if it finds that such issue . . . is for some lawful object . . . and compatible with the public interest); Motor Carriers Act, Sections 10761(b), 10762(f) (allowing ICC to "grant relief" from filing requirements "when relief is consistent with the public interest and the transportation policy); Immigration and Nationality Act, 8 U.S.C. Section 1182(d)(5)(A) (permitting Attorney General "for reasons deemed strictly in the public interest" to parole into the United States any alien applying for admission); Federal Aviation Act, 49 USC Section 44709(b)(1)(A) (allowing FAA to suspend pilot's certification as required by safety in air transportation and the "public interest"); Interstate Commerce Act, 49 U.S.C. Section 11344(c) (permitting railroad mergers if consistent with the public interest). See also The Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990)(noting that SEC has the authority in registering an exchange or association of brokers to consider whether its rules "in general . . . protect investors and the public interest)(citing 15 U.S.C. Sections 78f(b)(5), 78o-3(b)(6).

220 See Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)(the public interest serves as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy")). See also National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (holding that "public interest"